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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1334

RONALD KENT HOOPER AND
PURVIS OLE SCROGGS,

Petitioners,

vs.

THE HONORABLE WILLIAM H. GOODING,
Judge of the Superior Court of The State of Arizona; and
ROBERT K. CORBIN, County Attorney
Of Maricopa County, Arizona,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review an order of the United States Court of Appeals for the Ninth Circuit in Cause No. 22669 vacating an injunction previously entered by the United States District Court for the District of Arizona.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix E) is not yet reported. The findings, conclusions, and order of the District Court (Appendix D) are also not yet reported.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit from which this petition is taken was entered on March

28, 1968. (Appendix E). This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Can a state constitutionally require that all preliminary hearings in criminal cases, regardless of circumstances, be open to the public and the press? The subsidiary issues are fair trial, equal protection, and right to privacy.

2. Is there federal jurisdiction to enjoin state criminal proceeding in which the state trial judge is barred by state law from exercising his discretion as to whether preliminary hearings should be open or closed?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

The relevant constitutional provisions are the Fourth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution. The relevant provisions of the civil rights statutes are 28 U.S.C. Sec. 1343, and 42 U.S.C. Sec. 1983. These are all set forth in Appendix A. In addition, the case involves Rule 27 of the Rules of Criminal Procedure of the State of Arizona, which, prior to January 29, 1968, was as follows:

> "During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of the defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other until all are examined. The magistrate shall also, upon the request of the defendant, exclude from the examination every person except attorneys in the case, and officers of the court."

On January 29, 1968, the Supreme Court of Arizona deleted the last sentence of this Rule.

STATEMENT

This is an extraordinary episode which in the short period of February 21, 1968, to March 28, 1968, moved through five courts, three State and two Federal. The facts can perhaps be most easily organized into a division by courts.

1. *Original proceedings, State trial court.* This matter arose in connection with criminal proceedings in the Superior Court of Maricopa County, Phoenix, Arizona. The respondent William H. Gooding is a Judge of the Superior Court of the State of Arizona, the court of general jurisdiction in that State. Under the Arizona practice, a Superior Court Judge may sit as a committing magistrate to hold a preliminary hearing to determine whether there is good cause to bind over defendants for trial; this is what Judge Gooding was doing. The petitioners Hooper and Scroggs are, respectively, a lawyer and a bondsman of Arizona. They had been named as defendants in a complaint alleging receipt of stolen property. The respondent Corbin is the County Attorney in charge of the prosecution.

Prior to January 29, 1968, Rule 27 of the Rules of Criminal Procedure, issued by the Supreme Court of the State of Arizona, permitted a defendant in a criminal case, at his request, to have the preliminary hearing closed to the public. This was by virtue of the last sentence of that Rule, set forth above, which expressly so permitted. On that date, the Supreme Court of Arizona eliminated that sentence by amendment, substituting no other language.

On February 21, 1968, the preliminary hearing came on before Judge Gooding. After the taking of evidence on other defense motions (a matter relevant because it gave the trial judge some acquaintance with the matter at hand), the Court came to consider a defense motion to close the preliminary hearing. We attach the entire transcript of the proceedings on that motion as Appendix B, and point out the highlights here.

The essence of the support for the motion was that substantial pretrial publicity had already been given to the matter; that there was (on the earlier motions) already testimony that there had been promises of immunity given to witnesses in the case who were thus motivated to testify in a hostile manner, and that this testimony would be destructive of the professional reputations of the petitioners. The petitioners urged that despite the amendment to Rule 27, the State trial courts retained their discretion to govern their own courtrooms and their own preliminary hearings. The standards of the American Bar Association Advisory Committee on Fair Trial and Free Press, hereafter referred to as the Reardon Report, had just been adopted by the House of Delegates, and these were referred to in the argument. The attention of the trial court was expressly directed to Section 3.1 of those recommendations which provide that the motion to close a preliminary hearing "shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference." The petitioners argued that there was a substantial likelihood of interference and a substantial likelihood of prejudicial pretrial publicity. Petitioners made clear that their only wish was that there be no publicity prior to the trial of the case if it should ever be tried.

The prosecuting attorney in substance agreed that all of the injuries feared by the defendants would occur. He objected, however, to closing the hearing in the following language:

> "MR. DEBUS: I cannot, sir, in honesty or in good faith disagree with any but one point of what Mr. Flynn has said with reference to his motion to exclude. I will, however, object for the record on the basis that I feel that pursuant to our Supreme Court's revocation of that part of Rule 27, the Rules of Criminal Procedure, dealing with the exclusion of parties from preliminary hearing that this is a mandate from that court to the lower courts that that cannot now be done, and would object for the record on that basis."

The trial court thereupon denied the motion to exclude. Since we have set forth the exact language of his Findings and Conclusions in Appendix C, we shall not duplicate them here; but we ask that they be considered in the original text. The trial court found that there had already been substantial pretrial publicity; that evidence would be produced at the preliminary hearing which very well might not be admissible at any trial; that the publicity was detrimental to the professional and business reputations and the livelihoods of the parties. It expressed the view that a trial court had power "to prevent prejudicial publicity which might interfere with a fair and impartial trial if the defendants are bound over." It discussed the recommendations of the Reardon Report as evidence of the existence of that power and noted particularly the minimum standards which provided that a motion to close should be granted unless the court determined that there was no substantial likelihood of interference with the defendants' rights to a fair trial by an impartial jury.

Nonetheless, the motion was denied because, "The Court feels, though, that its own interpretation of its inherent power has been superseded by a recent action of the Arizona Supreme Court in which the last sentence of Rule 27 was deleted." The trial judge noted that the change in Rule 27 had been made by the State Supreme Court "while a case involving its constitutionality was being processed in the Arizona courts."

Judge Gooding concluded:

> "This Court interprets the action of the Supreme Court as a mandate, and this mandate is interpreted as meaning that the Superior Court or magistrate cannot in its or his discretion exclude all persons from a preliminary hearing. It is therefore ordered, and for these reasons alone, denying defendants' motion to exclude."

2. *The State appellate courts.* An application for a writ of mandamus, which carefully did not attempt to direct how the

discretion of the trial judge should be exercised, but merely to require him to exercise his discretion in some manner, was presented to the Court of Appeals of the State of Arizona.* That Court declined to consider the matter with the suggestion that it be presented instead to the State Supreme Court. Application was thereupon made to the State Supreme Court for the writ of mandamus. The writ was denied by that Court.**

3. *Proceedings in the Federal District Court.* Petitioners applied to the Federal District Court in the instant case for an injunction to restrain the Judge and the County Attorney from proceeding with hearings without the Judge exercising normal discretion to determine whether the hearings should be open or not; the relief sought was that the respondents be enjoined from continuing the proceedings "until such time as the defendant Gooding has exercised his discretion in this matter," and that in the meantime, the matter not proceed with an open hearing.

On the application for the temporary restraining order, the State essentially stipulated that if the trial judge "had the inherent power to exclude the public" then this "was an appropriate cause of the court to exercise its discretion in favor of a closed hearing." Counsel for petitioners urged that there was such discretion; counsel for the State contended that such discretion did not exist, that the trial judge had "no inherent power to exercise his discretion," and that therefore "all preliminary hearings must be open to the public." See Findings of Fact, Conclusions of Law, and Order of the trial Judge Walter E. Craig. (Appendix D). Thereupon the Federal District Court entered a temporary restraining order against further open preliminary hearings. The matter came on for consideration of the application for prelimi-

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*For factual details as to this application, see the companion case presented herewith, which is the petition for certiorari from the judgment of the State Supreme Court.

**See Finding of Fact No. 8.

nary injunction at the conclusion of which the Federal District Court found that there had been "substantial pretrial publicity prior to preliminary hearing in the State court"; that there was a likelihood of the presentation of evidence at the preliminary hearing which would be inadmissible at the time of trial if there should be a trial; that if publicity were distributed generally, the petitioners "might well suffer irreparable injury"; and, specifically, that "there might well be a likelihood that a fair and impartial jury might not be obtained in the trial in Maricopa County or adjacent counties."

In these circumstances, the District Court issued a preliminary injunction. It concluded as a matter of law that extensive pretrial publicity at the preliminary stage, if likely to impair the selection of a fair and impartial jury, denied the rights of petitioners under the Sixth and Fourteenth Amendments; that the State trial judge had inherent power to exercise discretion and that failure to exercise it was a violation of the right of privacy, a violation of the Ninth Amendment, and a violation of the Fourteenth Amendment. The prosecuting authorities were requested to institute an appropriate proceeding in order that the Supreme Court of Arizona might have an opportunity to make clear whether, through its amendment of Rule 27, it had actually intended to eliminate all discretion of trial judges. Meanwhile, the defendants were restrained from "continuing any further open preliminary hearing" in this matter.

4. *Proceedings in the Court of Appeals.* The State applied for extraordinary relief to the United States Court of Appeals for the Ninth Circuit, but its application for a special writ was not acted upon and we say no more about it here. It later perfected an appeal from the preliminary injunction. The appeal was substantially entirely on jurisdictional grounds. The Court of Appeals heard the matter specially on March 27, and issued an announcement that day vacating the injunction; but it amended

its decision on March 28. This decision is reproduced as Appendix E. The Court of Appeals, assuming without deciding that the District Court had jurisdiction, found that the Findings did not have sufficient certainty to justify the District Court's action. In the critical passage, the Court of Appeals held:

> "Thus the court found that there will be a *'likelihood'* of presentation of inadmissible evidence; the defendants *'might well suffer irreparable injury';* and that there *'might well'* be a likelihood' that a fair jury could not be obtained. In short there is no finding that prejudice or harm would in fact result from an open hearing. In our view a federal court injunction should not be based upon any such findings as those here referred to. Thus we do not reach other basic issues in the case."

5. *Subsequent developments.* Petitioners moved for a stay of mandate in the Court of Appeals, which was denied. Nonetheless, under Ninth Circuit practice, the mandate does not issue for thirty days, so that in a technical sense, the injunction of Judge Craig would not be vacated until April 27, 1968, or thereafter. It remained to complete the hearing before Judge Gooding. Since the injunction was still in effect, Judge Gooding concluded the preliminary hearing on a closed basis. Thereupon, on motion of the petitioners, he ordered that the record be impounded and that there be no publicity of the preliminary hearing proceedings pending application to this Court. He found probable cause and bound the petitioners over for trial, but the matter has not yet been set for trial in the State courts.

The record is thus impounded and the matter, so nearly as may be, is held in the status which existed at the time of the injunction pending the action of this Court. Unless this Court takes action to the contrary, the record will be released to the public under the order of Judge Gooding before there is any likelihood that the matter can be tried.*

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*For the factual details as to the post-Court of Appeals proceedings in the State trial court, see the petition for mandamus companion to this application.

REASONS FOR GRANTING THE WRIT

I. *Introduction.*

As will be developed, the decision of the court below conflicts with decisions of this Court. The matter is also of surpassing importance. Clearly, in at least a local sense, the matter is vital to every criminal prosecution in the State of Arizona; for the practical consequence is that no magistrate at a preliminary hearing has discretion to close any such hearing, regardless of the consequences. As the papers in connection with the application for mandamus to Judge Gooding (companion case) show, this is the practical interpretation in this State. But the decision of the court below transcends regional boundaries and regional error. The decision of the court below utterly guts the Reardon Report as applied to preliminary hearings. No conscientious trial judge could ever make findings firmer than those of Judge Gooding and of Judge Craig at the *beginning* of a preliminary hearing, because the evidence has not yet been taken, and one cannot know the result with assurance. Hence, the likelihood of presentation of inadmissible evidence, the probability of irreparable injury, and the likelihood that a fair jury cannot be obtained are all that could possibly be known at that stage. To say that this is not enough, and that the trial judge must have "certainty" makes protection impossible.

This case is a classic example of constitutional rights being lost in the maze of technicality. The ultimate question to be determined, somewhere, sometime, by someone, is whether petitioners have been deprived of their constitutional rights to a fair trial, to privacy, and to equal protection of the laws by being brought on for a preliminary hearing before a judge who has no discretion to determine whether that hearing shall be open or closed.

The State of Arizona has, to date, said not one word to justify this procedure. The original objection to closing the hearing was exclusively on the ground that the court had no discretion, and the argument in the court below was exclusively an attack on the jurisdiction of the Federal District Court.

To insure that the merits of this matter will not become a hidden ball, lost under jurisdictional shells, we bring the matter here in three separate proceedings, thus presenting it from every possible jurisdictional aspect. We here petition for certiorari from the Court of Appeals for Ninth Circuit. So that we may avoid all possible questions of federal jurisdiction, we also, in the first companion case, petition for certiorari from the final decision of the Arizona Supreme Court denying the writ of mandamus. And so that there will be no possible concern as to the jurisdiction of that Court, we also apply for a writ of mandamus directly to the State trial judge, should it be contended that his is the court of highest jurisdiction in the State of Arizona with the power to pass on this question.

II. *The Decision Below Conflicts with Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), and Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965).*

1. The decision of the State trial judge, which is the ultimate matter in issue here, is that the trial court "cannot in its or his discretion exclude all persons from a preliminary hearing." What this Court described as the "fundamental error" of the trial court was that "from the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts." The District Court found, in accordance with *Sheppard v. Maxwell,* that the State trial judge had this power. The decision of the court below creates "fundamental error" by depriving the trial judge of the power.

2. What has been said goes to conflict in principle; but there is also direct conflict in direct and controlling detail. Judge Craig expressly found that unless the hearings were closed "there might well be a likelihood that a fair and impartial jury might not be obtained." He did not coin this thought; he took it from *Sheppard v. Maxwell,* which calls for the invocation of remedies "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial." 384 U.S. at 363.

It is this language, word for word, taken from *Sheppard v. Maxwell* by Judge Craig which the Court of Appeals finds is insufficient. It held that the finding "that there 'might well' be a 'likelihood' that a fair jury could not be obtained" is lacking in the requisite "certainty."

As we suggested in our Introduction, on the merits of this point, *Sheppard v. Maxwell* was right and the Court of Appeals was wrong. All the magistrate can know at the beginning is whether there is a likelihood of failure of fair trial. Since he has not yet heard any of the evidence, or any particular amount of it, he can scarcely have a certainty. But right or wrong, there is a conflict.

3. There is a further conflict, at least of spirit. In *Sheppard,* this Court said, 384 U.S. at 362, that, "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused." Judge Craig did. The opinion continues, "And appellate tribunals have the duty to make an independent evaluation of the circumstances." The Ninth Circuit made no independent evaluation of the circumstances.

4. In a more general sense, there is also conflict with *Estes v. Texas, supra.* As Chief Justice Warren said in his concurring opinion there, "An accused is entitled to procedural protections at

pretrial hearings as well as at actual trial." The decision of the Court of Appeals obliterates that protection.

III. *The Questions Presented are Important.*

A. *The Jurisdictional Questions.*

There are substantial jurisdictional questions here. We have contended that there is federal jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343, read in combination with 42 U.S.C. § 1983, which permits equitable actions to prevent the deprivation under color of any statute, ordinance, regulation, custom, or usage of any State of any rights, privileges or immunities secured by the Constitution. Petitioners relied for federal jurisdiction in the court below on numerous cases, including *Urbano v. Calissi,* 353 F.2d 196 (3d Cir. 1965); *Harmon v. Superior Court,* 307 F.2d 796 (9th Cir. 1962); *Armstrong v. Rushing,* 352 F.2d 836 (9th Cir. 1965); and also on *Bell v. Hood,* 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946). Petitioners contended, successfully in the Federal District Court, that there was no barrier to equitable jurisdiction under 28 U.S.C. § 2283 in the light of the many cases which permit an injunction where there is an irreparable injury to contitutional rights, citing a number of cases, including *Dombrowski v. Pfister,* 380 U.S. 479, 483-86, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965). Petitioners also contended that there was no want of jurisdiction because of the abstention doctrine in the light of *Zwicker v. Koota,* ____ U.S. ____, 88 S. Ct. 381, ____ L. Ed. 2d ____ (1967).

We say no more about the jurisdictional questions because the Court of Appeals did not decide them; it assumed the jurisdiction of the District Court without deciding that issue. We do, however, fully acknowledge that there are important jurisdictional questions involving significant matters of federal-state relationships. We assume that, unless this Court otherwise directs, should it grant certiorari these questions would be here and that if the Court

does not wish to consider them, it would restrict the scope of the petition to the first of the two questions presented.

B. *The Importance of the Fair Trial Issue.*

The decision of the court below is a rejection of the Reardon Report almost before its ink is cold. In so saying, we do not cite the Reardon Report as authority, although we think it is to be deeply respected. We offer it merely as evidence of the general and public importance of the question presented. Most states will adopt the Reardon standards; many have express provisions in their existing law that the standards of the American Bar Association are automatically imported into their practice. The uncertainties created by the decision of the court below are so far-reaching as to warrant the consideration of this Court.

Let us demonstrate the conflict by precise detail; on the page following we print in parallel columns the relevant language of the Reardon Report, the findings of the trial judge which obviously were drafted with the Reardon Report standards in front of him, and the decision of the Court of Appeals which, by rejecting the findings, also necessarily rejects the report on which it is based.

Excerpt from Paragraph 3.1, Reardon Report.*	Findings 10 and 11 of District Judge Craig	Decision of the Court of Appeals
"In any preliminary hearing . . . in a criminal case . . . the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference."	"10. Based upon the findings of the presiding judge in the State Court proceedings, and the record in this Court, this Court further finds that there has been substantial pretrial publicity prior to the preliminary hearing in the State Court. "11. This Court further finds that there will be a likelihood of the presentation of evidence at the preliminary hearing in the State Court which may very well not be admissible at the time of trial, if there is a trial; that if publicity is distributed generally with respect to the evidence submitted at the preliminary hearing in the State Court the defendants in the State Court proceeding might well suffer irreparable injury; that in the event of general publicity of the matters presented at the preliminary hearing in the State Court proceeding there might well be a likelihood that a fair and impartial jury might not be obtainable in a trial in Maricopa County or adjacent counties."	"In this case the Findings upon which the trial court based its decision are hypothetical and supposititious. They do not have the certainty which should be required to justify the trial court's action. Thus the court found that there will be a *'likelihood'* of presentation of inadmissible evidence; the defendants *'might well suffer irreparable injury'*; and that there *'might well'* be a 'likelihood' that a fair jury could not be obtained. In short there is no finding that prejudice or harm would in fact result from an open hearing. In our view a federal court injunction should not be based upon any such findings as those here referred to. Thus we do not reach other basic issues in the case."

* From *Standards Relating To Fair Trial and Free Press,* recommended by the Advisory Committee on Fair Trial and Free Press, American Bar Association Project on Minimum Standards for Criminal Justice, December, 1967.

The question of whether a "certainty" or a "likelihood" of prejudice as a ground for closing a preliminary hearing meets the standards not only of the Reardon Report, but also of *Sheppard v. Maxwell* is a question of genuine and pressing importance in every state.

There are also presented by this petition important questions of the power of a federal court to insure the right to privacy by preventing the invasion of individual privacy before probable cause has been determined in a criminal matter, and important questions of equal protection of laws.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted.

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April, 1968

APPENDIX A

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

vs.

RONALD KENT HOOPER and
PURVIS OLE SCROGGS,

Defendants.

No. 54087

Phoenix, Arizona
February 21, 1968

BEFORE: Honorable William H. Gooding

APPEARANCES:

On behalf of the State:
Mr. Larry Debus
Mr. Robert Hertzberg
Mr. Donald Harris

On behalf of defendant Hooper:
Mr. John Flynn
Mr. Gerald A. Machmer
Mr. Samuel Kelsall
Mr. Robert A. Jensen

On behalf of defendant Scroggs:
Mr. Henry J. Florence

THE COURT: I understand you have one more motion.

MR. FLYNN: Yes, your Honor. We have not yet filed this motion. It's a motion to exclude in relation to this hearing.

THE COURT: I take it that defendant Scroggs joins in this motion?

MR. FLORENCE: Yes, your Honor.

THE COURT: May the record so show.

You may certainly present your argument, but you're primarily concerned with fair trial.

MR. FLYNN: Simply to focus on what we feel our problem is, we feel that prior prcoeedings in this case in the past demonstrating statements which have been made, statements which have been participated in by prosecution, even though this was supposed to be a one-man grand jury, have been given to the press. Substantial pretrial publicity has been given to the matter. The defendant in this case is a professional man. I would submit that he is entitled to have this situation, especially now in view of the testimony of persons who have been promised immunity for dozens of serious felony cases involving hundreds of thousands of dollars who are so motivated to testify against him in a court to secure their release on some kind of a deal to leave Arizona, all of these kind of things being brought out in the testimony, and the kind of testimony that would be elicited would totally destroy this man's professional reputation, if in fact your Honor fails to find probable cause from the evidence. Based upon what necessarily has been developed from the background, character and reputation, I think your Honor has had some preview of the kind of things and kind of testmiony brought out.

Secondly, we're fully aware of Supreme Court amended Rule 27, taking out the right that all persons other than the officers of the court be excluded from the courtroom. I feel that this court

still has discretion under its inherent powers to control the proceedings in this court, that under the nature and circumstances that exist in the case, the pretrial publicity, the knowledge that your Honor has of the nature of the testimony and the kind of things that will be brought out, to close this hearing to all persons except officers of the court, and we do so request. That's the purpose of our motion. In addition, we would remind your Honor that the American Bar Association Advisory Committee on Fair Trial and Free Press did recommend to the House of Delegates, and it was passed, the so-called fair trial or free press minimum standards for criminal justice, commonly referred to as the Reardon report, Section 3.1, pretrial hearings.

"It is recommended that the following rule be adopted in each jurisdiction by the appropriate court:

"Motion to exclude public from all or part of pretrial hearing. "In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference."

Based upon your Honor's professional knowledge of this case, and all of the other matters, we would say to your Honor that a finding should be made that there is a substantial likelihood of this interference, and substantial likelihood of prejudicial pretrial publicity will occur.

THE COURT: What was the interference?

MR. FLYNN: "The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference."

By "likelihood of such interference," they're talking about inadmissible evidence being placed in the paper in advance of the trial which would not be admissible at the trial.

It says also, "With the consent of the defendant," and the record clearly shows that it's the defendant's request that this motion is made. Again, I would like the record to show that while we feel the Court has this discretion, that we are entitled to a ruling by the court under its inherent powers to control the proceedings in its courtroom that your Honor has an alternative, that is in the spirit of cooperation which the news media urge upon us, which we're supposed to acknowledge, that the members of the press be allowed to remain in this hearing so that they have full access to these proceedings upon the condition that they give to your Honor their commitment that any of the matters which are presented in this courtroom will not in fact be printed prior to the trial of this case, and in event your Honor makes a finding that there is no probable cause against Mr. Hooper in these proceedings, that they will not in fact print any of these proceedings. Consequently, attempting to give full access to other persons who consider themselves representative of the public to be present at these proceedings, so that there is no criticism in that respect as to how the matter is handled, and that if in fact Mr. Hooper is held to answer, if a jury trial is held in this trial, the moment after the jury returns a verdict in that case, they are free to print these matters which occurred in the courtroom because of the very strong reason, or at least one of the very strong reasons ceases to exist, and that's the pretrial publicity.

I don't know if your Honor desires to avail yourself of this kind of procedure. So that there is no question that this defendant is not trying to have justice done behind closed doors or to secret anything of this kind, I simply want the record clear on that aspect of our motions. But we do request that your Honor somehow control these proceedings to assure that number one, that the defendant's constitutional right to a fair and impartial trial is

preserved. If your Honor is satisfied that there is substantial likelihood that the publicity from these procedings will deny him that right, I think, your Honor, our memorandum setting forth the citations from Sheppard versus Maxwell, from the instructions I feel that are inherent in this case to any judge sitting in a hearing of this kind, control the proceedings to see that this has not occurred. Also, we refer your Honor to Estes versus Texas. I'm sure that you're aware that there are a number of other cases that have this same concept, that if it's within the control of the court, the power of the court to eliminate prejudicial pretrial publicity, it should avail itself of these various means, whatever they may be.

I don't believe that the Supreme Court by amendment of Rule 27 did take from your Honor one bit of your discretionary and inherent powers to afford this defendant a right to a fair trial.

MR. FLORENCE: Mr. Scroggs is a business man here in Phoenix. His business has already been seriously damaged, his reputation seriously damaged by articles which even made the front page of the local newspaper concerning a "secret" one-man grand jury which was going on in this particular matter. It would appear clear in view of my reading the Reardon report and the comments made on the report in the newspaper, it would appear that it now reaches an ethical point where an attorney must ethically request, and it almost appears that the court ethically requires that the court exclude the press from pretrial.

Your Honor, it is the contention of defendant Scroggs that already his rights have been seriously jeopardized before we even reach this partciular point due to the great amount of publicity in the papers concerning this matter.

For that matter, and to insure a fair trial and fair interpretation of the facts and in that the public may not be made aware of certain matters which would jeopardize a fair trial, and that a preliminary hearing does not have the same stringent rules that we

have at trial, I would join in the motion of Mr. Flynn that the press be excluded from this particular hearing.

MR. DEBUS: I cannot, sir, in honesty or in good faith disagree with any but one point of what Mr. Flynn has said with reference to his motion to exclude. I will, however, object for the record on the basis that I feel that pursuant to our Supreme Court's revocation of that part of Rule 27, the Rules of Criminal Procedure, dealing with the exclusion of parties from preliminary hearing that that is a mandate from that court to the lower courts that that cannot now be done, and would object for the record on that basis.

THE COURT: The court finds that there has been substantial pretrial publicity prior to the time of this preliminary hearing as reflected by the exhibits attached to defendants' motion.

The court further finds that there will be evidence produced at the preliminary hearing which very well may not be admissible at the time of the trial, if there is a trial.

The court finds that one of the defendants is a professional man and one of the defendants is a business man, and that any publicity whatever in connection with these charges is detrimental to their professional and business reputations, and in effect their livelihoods.

The court feels that it has the inherent power to control pretrial proceedings to accomplish at least two purposes: to protect the reputation of those who are charged with crimes but not yet bound over to Superior Court, and secondly, to prevent prejudicial publicity which might interfere with a fair and impartial trial if the defendants are bound over.

The Court also feels that there is a strong affirmation of this power of the court set forth in the minimum standards relating to fair trials and free press just approved in Chicago by the American Bar Association House of Delegates in which it is recommended

that each jurisdiction adopt a rule permitting a defendant to request that pretrial hearings be closed to the public on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The recommended minimum standards also provide that the motion shall be granted unless the trial court determines there is no substantial likelihood of such interference with defendant's right to a fair trial by an impartial jury.

Section 3.1 then goes on to provide a possible alternate method of handling the problems of pretrial publicity by requesting cooperation of the press and public.

The court feels, though, that its own interpretation of its inherent power has been superseded by a recent action of the Arizona Supreme Court in which the last sentence of Rule 27 was deleted. This last sentence reads as follows: "The magistrate shall also upon the request of the defendant exclude from the examination every person except attorneys in the case and officers of the court." This change in Rule 27 was made by the Supreme Court while a case involving its constitutionality was being processed in the Arizona courts.

This court interprets the action of the Supreme Court as a mandate, and this mandate is interpreted as meaning that the Superior Court or magistrate cannot in its or his discretion exclude all persons from a preliminary hearing.

It is therefore ordered, and for these reasons alone, denying defendants' motion to exclude.

Is there anything else that I omitted from the order that you might add?

MR. FLYNN: Only if I might ask the court one question so the record is clear on this, that it's your Honor's position that the amendment of Rule 27 by the Supreme Court has divested your

Honor of any discretion in the matter of exclusion at the request of the defendant of the public from a preliminary examination; is that correct?

THE COURT: Yes.

CERTIFICATE

I, Robert L. Hughes, do hereby certify that I am a duly certified and qualified court reporter for the Superior Court of the State of Arziona, at Phoenix, and do hereby certify that the foregoing proceedings were reported by me in shorthand, and thereafter the same were reduced to typewriting.

I hereby certify that the foregoing transcript constitutes a full, true and accurate transcript of the proceedings had at the time, to the best of my ability.

WITNESS my hand this 22 day of February, 1968.

ROBERT L. HUGHES
Official Court Reporter

APPENDIX C

IN THE SUPERIOR COURT OF
MARICOPA COUNTY, STATE OF ARIZONA

DIVISION OR COURT COMMISSIONER No. 14

WILLIAM H. GOODING,
Judge or Court Commissioner

WILSON D. PALMER, Clerk
FLORENCE DRAHEIM, Deputy

February 21, 1968

STATE OF ARIZONA vs. RONALD KENT HOOPER and PURVIS OLE SCROGGS	CR 54087

Larry Debus
Robert Hertzberg
Donald W. Harris
Deputy County Attorneys

John J. Flynn
Robert A. Jensen
Gerald Machmer
Henry Florence

1:45 P.M. This is the time set for the preliminary hearing in this matter.

Respective counsel are present; defendant Ronald Kent Hooper is present; Court Reporter, Robert L. Hughes, is present.

FILED: Motion for production of witness confined to Maricopa County Jail.

Counsel for defendant Hooper, John J. Flynn, moves to dismiss the complaint.

Counsel for defendant Scroggs, Henry Florence, joins in this motion.

Counsel for the State, Robert Hertzberg, responds.

Respective counsel argue the motion to the Court.

IT IS ORDERED denying defendants' motion to dismiss.

The record may show the Court instructs the County Attorney to make the original complaint a part of the file.

Counsel for defendant Hooper, John J. Flynn, moves to quash search warrant as to defendant Hooper.

Counsel for defendant Scroggs, Henry Florence, joins in the motion to quash search warrant as to defendant Scroggs.

Counsel for the State, Larry Debus, responds.

2:25 P.M. Court stands at recess. The Court and counsel retire to Chambers for hearing on defendant's motion to suppress.

In Chambers: Respective counsel are present; defendant Hooper is present; Court Reporter, Robert L. Hughes, is present.

Mr. Flynn, counsel for defendant Hooper, moves to hold up the hearing on the motion to quash until the original complaint is delivered in accordance with the Court order.

IT IS ORDERED denying the request to hold up the hearing.

Counsel for defendant Hooper (John J. Flynn) moves to suppress.

Counsel for defendant Scroggs, Henry Florence, joins in the motion to suppress.

Ronald Geisler is sworn and testifies.

Mr. Flynn requests a copy of the oral testimony as given at the time of the hearing before Judge Chatwin.

3:20 P.M. Court stands at recess.

3:30 P.M. Court reconvenes in Chambers. Respective counsel are present; defendant Hooper is present; Court Reporter, Robert L. Hughes, is present.

Ronald Geisler further testifies.

Mr. Flynn moves to be given the oral reports relating to the information received from the so-called "confidential informant" by Mr. Geisler.

IT IS ORDERED denying the motion as to the oral reports.

Mr. Flynn moves the Court to be allowed to pursue the authenticity of the Hooper affidavid for search warrant.

IT IS ORDERED denying the motion to pursue the authenticity of the Hooper affidavit for search warrant.

4:30 P.M. Court stands at recess.

4:40 P.M. Court reconvenes in Chambers. Respective counsel are present; defendant Hooper is present; Court Reporter, Robert L. Hughes, is present.

Gilbert Leonard O'Shia is sworn and testifies.

Mr. Debus, for the State, objects to any testimony being taken of Lorraine Jeannette O'Shia.

The Court overrules the objections.

Lorraine Jeannette O'Shia is sworn and testifies.

Mr. Flynn moves the Court to take the motion to quash the search warrants under advisement.

Mr. Florence joins in this motion.

IT IS ORDERED the motions of both defendants to quash search warrants is denied.

5:55 P.M. Court stands at recess.

6:00 P.M. Court reconvenes in the courtroom. Respective counsel are present; defendant Hooper is present; Court Reporter, Robert L. Hughes, is present.

Mr. Flynn moves to sever.

Mr. Florence joins in the motion to sever.

IT IS ORDERED denying the motion of both defendants to sever.

Mr. Flynn moves to exclude.

Mr. Florence joins in the motion to exclude.

Counsel for the State, Mr. Debus, makes his objections.

THE COURT FINDS that there has been substantial pretrial publicity prior to the time of this preliminary hearing as reflected by the exhibits attached to defendants' motion.

THE COURT FURTHER FINDS that there will be evidence produced at the preliminary hearing which very well may not be admissible at the time of the trial, if there is a trial.

THE COURT FINDS that one of the defendants is a professional man and one of the defendants is a business man, and that any publicity whatever in connection with these charges is detrimental to their professional and business reputation, and in effect their livelihoods.

The Court feels that it has the inherent power to control pretrial proceedings to accomplish at least two purposes: one to protect the reputation of those who are charged with crimes but

not yet bound over to Superior Court, and secondly, to prevent prejudicial publicity which might interfere with a fair and impartial trial if defendants are bound over.

The Court also feels that there is a strong affirmation of this power of the court set forth in the minimum standards relating to fair trials and free press just approved in Chicago by the American Bar Association House of Delegates in which it is recommended that each jurisdiction adopt a rule permitting a defendant to request that pretrial hearings be closed to the public on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The recommended minimum standards also provide that the motion shall be granted unless the trial court determines there is no substantial likelihood of such interference with defendant's right to a fair trial by an impartial jury.

Section 3.1 then goes on to provide a possible alternate method of handling the problems of pretrial publicity by requesting cooperation of the press and public.

The Court feels, though, that its own interpretation of its inherent power has been superseded by a recent action of the Arizona Supreme Court in which the last sentence of Rule 27 was deleted. This last sentence reads as follows: "The magistrate shall also, upon the request of the defendant, exclude from the examination, every person except attorneys in the case and officers of the court." This change in Rule 27 was made by the Supreme Court while a case involving its constitutionality was being processed in the Arizona courts.

This Court interprets the action of the action of the Supreme Court as a mandate, and this mandate is interpreted as meaning that the Superior Court or magistrate cannot, in its or his discretion, exclude all persons from a preliminary hearing.

IT IS THEREFORE ORDERED, and for these reasons alone, denying defendants' motion to exclude.

Mr. Flynn moves that the matter of the preliminary hearing be continued until 1:30 P.M., on Friday, February 23, 1968.

IT IS ORDERED continuing this matter until 1:30 P.M. on Friday, February 23, 1968.

FILED: Motion to Exclude.

FILED: Motion for Severance

FILED: Motion to Quash Search Warrant

FILED: Petition for production of witness (2/16/68)

FILED: Notice of hearing (2/16/68)

FILED: Motion for mental examination of complaining witness (2/16/68)

FILED: Notice of Controverting grounds for issuance of search warrants (2/16/68)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

RON KENT HOOPER and PURVIS OLE SCROGGS, Plaintiffs, vs. HONORABLE WILLIAM H. GOODING, Judge of the Superior Court of the State of Arizona, and the STATE OF ARIZONA, by Robert Corbin, County Attorney of Maricopa County, Arizona, Defendants.	No. Civ-6597 Phx. Findings of Fact Conclusion of Law and Order

The above entitled cause came on for hearing before this Court February 26, 1968, upon plaintiffs' complaint for a temporary restraining order and for injunction. There were present counsel for plaintiffs and counsel for defendants. Memorandum in support of plaintiffs' position was submitted February 26, 1968.

Both counsel concurred that, if the presiding judge at the preliminary hearing before the Honorable William H. Gooding, Judge of the Superior Court of the State of Arizona, had the inherent power to exclude the public in cause No. Cr. 54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs,* then pending, the cause referred to was an appropriate cause for the Court to exercise its discretion in favor of a closed hearing.

Counsel for plaintiffs urged that the presiding judge at the preliminary hearing retained the inherent power to exercise his discretion, for good cause, in favor of a closed hearing, regardless

of the amendment to Rule 27 of the Rules of Criminal Procedure promulgated by the Supreme Court of the State of Arizona.

Counsel for defendants urged that, regardless of whether there was good cause, the presiding judge at the preliminary hearing had no inherent power to exercise his discretion because of the amendment to Rule 27 promulgated by the Supreme Court of the State of Arizona January 29, 1968, effective February 1, 1968, and must, therefore, require that all preliminary hearings must be open to the public.

At the conclusion of the hearing, and on February 26, 1968, this Court entered a temporary restraining order against the Honorable William H. Gooding, Judge of the Superior Court of the State of Arizona, and Robert Corbin, County Attorney of Maricopa County, Arizona, directing said defendants to abstain from any further open preliminary hearing in cause No. Cr. 54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs,* until Monday, March 4, 1968, or until further order of the Court.

Thereafter, by stipulation entered into between counsel for plaintiffs and counsel for defendants dated February 29, 1968, the hearing set for Monday, March 4, 1968, to determine whether a preliminary injunction should issue was contained to Friday, March 8, 1968, and it was so ordered March 1, 1968.

On March 7, 1968, counsel for plaintiffs filed a supplemental memorandum. On March 8, 1968, defendants filed their answer with supporting memorandum. The matter was presented and argued to the Court on March 8, 1968. At the conclusion of the hearing, based upon evidence presented, the arguments of counsel and the memoranda submitted, this Court concluded it had jurisdiction of the matter pursuant to Title 28 U.S.C. § 1343 and Title 42 U.S.C. § 1983, and the Court ordered that a preliminary injunction issue against the defendants with respect to any pre-

liminary hearing open to the public in the matter of *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs* until such time as the Supreme Court of the State of Arizona might have an opportunity to clarify interpretation of Rule 27 of the Rules of Criminal Procedure as amended January 29, 1968, effective February 1, 1968. At that time the Court further instructed Mr. Martin, appearing on behalf of the defendants, or Mr. Corbin, County Attorney of Maricopa County, to institute appropriate proceedings in order that the Supreme Court of Arizona might have the opportunity to make an utterance clarifying the interpretation of Rule 27. At the same time the Court advised counsel for plaintiffs and counsel for defendants, should they care to have a formal order, they might collaborate for the purpose of presenting a proposed order not inconsistent with what the Court stated orally from the bench.

Thereafter, on March 15, 1968, counsel for plaintiffs submitted a proposed formal order advising counsel for defendants that the matter had been requested to be heard March 18, 1968.

On March 18, 1968, it appeared that counsel for defendants and counsel for plaintiffs could not agree as to the material contained in the proposed formal order. On March 19, 1968, counsel for plaintiffs submitted an amended proposed findings of fact, conclusion of law and judgment, and counsel for defendants submitted objections thereto.

In view of the foregoing recitation of the status of this cause, this Court makes the following findings, conclusions and order in conformity with its oral ruling of March 8, 1968.

FINDINGS OF FACT

1. At the time this action was instituted in this Court a preliminary hearing was pending in the Superior Court of the State of Arizona in and for the County of Maricopa entitled No. Cr.

54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs.*

2. Counsel for the defendants in the State Court proceeding moved to the presiding judge at the preliminary hearing to exclude the public from the hearing, stating to the Court the grounds for their motion.

3. The grounds for the motion presented by counsel for the defendants Hooper and Scroggs are set forth in the record of this Court as Exhibit A, attached to plaintiffs' complaint.

4. In response to counsel's motion in the State cause, the County Attorney stated that he could not, in good faith, disagree with the statement presented to the Court by counsel for defendants, except for one point, to-wit: that the amendment to Rule 27 of the Arizona Rules of Criminal Procedure constituted a mandate from the Supreme Court of Arizona to the lower courts that all preliminary hearings must be open and that the lower Court had no inherent power to exercise its discretion, for good cause, to close a preliminary hearing (Tr. State Court Proceeding, pp.8-9).

5. The presiding Judge in the State Court proceeding found:

(a) that in the cause before it there had been substantial pretrial publicity prior to the time of the preliminary hearing;

(b) that evidence would be produced at the preliminary hearing which very well might not be admissible at the time of trial, if there was a trial;

(c) that one of the defendants in the cause before it was a professional man; that the other was a businessman; that any publicity in connection with the matters then before the Court would be detrimental to their professional and business reputations, and affect their livelihoods;

(d) that the amendment to Rule 27 of the Arizona Rules of

Criminal Procedure constituted a mandate from the Supreme Court of Arizona that the Superior Court of Arizona, or a Magistrate could not in its discretion exclude all persons from a preliminary hearing.

6. Subsequent to the decision of the Superior Court of the State of Arizona in and for the County of Maricopa hereinabove referred to, counsel for the defendants made application to the Court of Appeals of Arizona for a writ of mandamus, directing the Superior Court to close the preliminary hearing to the public.

7. The record discloses that the Court of Appeals of Arizona did not accept the application for the writ, and suggested to counsel that the application be presented to the Supreme Court of the State of Arizona.

8. Upon presentation of the application to the Supreme Court of Arizona, that Court denied the application without comment.

9. Counsel for the defendants in the State action then instituted these proceedings before this Court.

10. Based upon the findings of the presiding judge in the State Court proceeding, and the record in this Court, this Court further finds that there has been substantial pretrial publicity prior to the preliminary hearing in the State Court.

11. This Court further finds that there will be a likelihood of the presentation of evidence at the preliminary hearing in the State Court which may very well not be admissible at the time of trial, if there is a trial; that if publicity is distributed generally with respect to the evidence submitted at the preliminary hearing in the State Court the defendants in the State Court proceeding might well suffer irreparable injury; that in the event of general publicity of the matters presented at the preliminary hearing in the State Court proceeding there might well be a likelihood that

a fair and impartial jury might not be obtainable in a trial in Maricopa County or adjacent counties.

12. Plaintiffs in this cause have exhausted their state remedies.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to Title 28 U.S.C. §1343 and Title 42 U.S.C. §1983.

2. Under the circumstances of this case the jurisdiction of this Court is not suspended or restrained by Title 28 U.S.C. §2283, nor by any other statute.

3. The Sixth and Fourteenth Amendments to the Constitution of the United States guarantee to a defendant a trial by a fair and impartial jury, free from outside influence. Extensive pretrial publictiy concerning matters presented at the preliminary stage of the proceedings likely to impair the selection of a fair and impartial jury denies the rights of defendants guaranteed by the Sixth and Fourteenth Amendments.

4. A presiding Judge at a preliminary hearing, under the law of Arizona, has the inherent power to exercise his discretion, for good cause, to close such a hearing called for the purpose of determining probable cause, particularly where evidence will be presented at the preliminary hearing which will not be admissible at trial, and where the publicity thereof will make it likely that a fair and impartial jury may not be able to be selected. Failure to exercise such discretion under appropriate circumstances might well constitute a violation of a defendant's right to privacy, a violation of the Ninth Amendment to the Constitution of the United States, and a violation of the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE IT IS ORDERED that a preliminary injunction issue against the defendants, restraining them from continuing any further open preliminary hearing in the matter now pending

in the Superior Court of Arizona in and for the County of Maricopa entitled No. Cr. 54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs,* pending clarification of the interpretation of Rule 27 of the Rules of Criminal Procedure for the State of Arizona, as amended by the Supreme Court of the State of Arizona.

In implementation of the foregoing order, Mr. Corbin, County Attorney for Maricopa County, Arizona, and Mr. Martin, Deputy County Attorney for Maricopa County, Arizona, or either of them, are requested to institute appropriate proceedings in order that the Supreme Court of Arizona might have an opportunity to issue an utterance with respect to its interpretation of the Rule 27 as amended.

DATED this 19th day of March, 1968.

United States District Judge
WALTER E. CRAIG

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HONORABLE WILLIAM H. GOODING, Judge of the Superior Court of the State of Arizona, and ROBERT K. CORBIN, County Attorney of Maricopa County, Arizona, *Appellants,* vs. RON KENT HOOPER and PURVIS OLE SCROGGS, *Appellees.*	No. 22,669 AMENDED DECISION ON APPEAL

[March 28, 1968]

On Appeal from the United States District Court for the District of Arizona

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Before: CHAMBERS, POPE and KOELSCH, Circuit Judges.

Per Curiam:

Assuming jurisdiction in the district court to entertain and decide the petition for a temporary injunction, without deciding its jurisdiction, we find under the circumstances of this case that the district court should have denied the temporary injunction which it issued. Therefore, the temporary injunction should be vacated.

It must be conceded that as a matter of policy the federal court should rarely undertake to inject itself in state court criminal proceedings. In this case the findings upon which the trial court based its decision are hypothetical and suppositious. They do not

have the certainty which should be required to justify the trial court's action. Thus the court found that there will be a *"likelihood"* of presentation of inadmissible evidence; the defendants *"might well suffer irreparable injury"*; and that there *"might well"* be a "likelihood" that a fair jury could not be obtained. In short there is no finding that prejudice or harm would in fact result from an open hearing. In our view a federal court injunction should not be based upon any such findings as those here referred to. Thus we do not reach other basic issues in the case.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1334 ~~Misc.~~

RONALD KENT HOOPER and PURVIS OLE SCROGGS,
Petitioners,

vs.

THE HONORABLE WILLIAM H. GOODING, JUDGE
OF THE SUPERIOR COURT OF THE
STATE OF ARIZONA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

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RONALD KENT HOOPER and PURVIS OLE SCROGGS,
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vs.

THE HONORABLE WILLIAM H. GOODING, JUDGE
OF THE SUPERIOR COURT OF THE
STATE OF ARIZONA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTIONS PRESENTED

Does a Judge of a United States District Court have jurisdiction to intermeddle in a routine state criminal prosecution by granting injunctive relief directed to a County Attorney and a Magistrate absent a showing of irreparable injury to federally protected rights which is clear and imminent?

STATEMENT OF THE CASE AND ARGUMENT

The District Judge did not receive any testimony but relied upon the findings stated by the Superior Court Judge sitting as a Magistrate. The evidence before the Superior Court Judge was not made a part of the record. The Superior Court Judge made, in substance, these findings:

1. There had already been substantial pretrial publicity. (There was no finding as to whether this publicity was favorable or unfavorable).

2. Evidence would be produced at the trial "which very well might" be inadmissible at the time of trial.

(Just why the Magistrate would be unable to control the hearing and exclude inadmissible testimony was not stated or adverted to).

3. One defendant was a professional and one a business man. Hence publicity as to the matters before the Court would be detrimental to their reputations and livelihoods. (There was no evidence offered to support this conclusion).

These were the state magistrate's findings amplified, without evidence, by the District Judge to include the finding that "if" publicity is distributed generally as to preliminary hearing evidence the defendants in the state court "might well suffer" irreparable injury and there "might well be a likelihood" that a fair and impartial jury "might not be obtainable" on the trial of the criminal charge.

There was no evidence to support these findings by the District Judge and the evidence before the state magistrate was not part of the record before the District Judge.

Despite the fact that the Arizona Supreme Court refused to entertain a Petition for a Writ of Mandamus directed to the magistrate or issue a Writ of Mandamus to Magistrate Gooding, Judge Craig issued a preliminary order and an interlocutory order to the state magistrate and the state County Attorney enjoining each from further proceeding with an open preliminary hearing "pending clarification of the interpretation of Rule 27 of the (Arizona) Rules of Criminal Procedure." The District Judge also requested the County Attorney to initiate appropriate proceedings "in order that the Supreme Court of Arizona might have an opportunity to issue an utterance with respect to the interpretation of Rule 27, as amended."

(App. D. Petition For Writ, p. 32, et seq.)

This is the substance of the support for the action of the District Judge in interfering and, in effect, sitting as a monitor in

a routine "receiving stolen property" prosecution by the State of Arizona. The Ninth Circuit Court of Appeals found it wholly inadequate.

This Court has in many cases stated the standards and tests to be applied when relief is sought in a federal court under its equity powers against state judicial action claimed to impinge upon federally protected rights. The record before the District Court falls far short of measuring up to these standards.

See: *Peck v. Jenness*, 7 How. 612
Taylor v. Carryl, 20 How. 583
Harkrader v. Wadley, 172 U.S. 148
Ex Parte Young, 209 U.S. 123
Douglas v. City of Jeanette, 319 U.S. 157
Stefanelli v. Minard, 342 U.S. 117
Wilson v. Schnettler, 365 U.S. 381
Cleary v. Bolger, 371 U.S. 392
Dombrowski v. Pfister, 380 U.S. 479

CONCLUSION

The Petition should be denied.

Respectfully submitted,

DARRELL F. SMITH
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Attorneys for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1334

RONALD KENT HOOPER and
PURVIS OLE SCROGGS,

Petitioners,

vs.

THE HONORABLE WILLIAM H. GOODING,
Judge of the Superior Court of The
State of Arizona; and ROBERT K. CORBIN,
County Attorney of Maricopa County, Arizona,

Respondents.

CLOSING MEMORANDUM OF PETITIONERS ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners sought a closed preliminary hearing on the grounds that the publicity resulting from an open hearing would cause substantial likelihood of unfair trial and destruction of professional reputations. The prosecuting attorney affirmatively con-

ceded this, objecting only on the ground of a total lack of any discretion in the trial court to close any hearing (Pet. Br. 23); the state trial judge denied the motion exclusively on this ground (Pet. Br. 30-31). The heart of respondents' opposition is the assertion that "there was no evidence to support these findings by the District Judge and the evidence before the state magistrate was not part of the record before the District Judge." (Brief in Opposition, p. 2). Respondents overlook the pleadings; the essential facts as to the events before the magistrate were alleged in the complaint (par. 6, R. 2) and admitted by Judge Gooding's counsel (Transcript of Hearing, March 8, 1968, at 2-3). Judge Gooding's findings are in the District Court record. (Pet. Br. 30-31).

We say that this denial conflicts with *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), and *Estes v. Texas,* 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965); respondents do not mention those cases. We say that the decision of the Court of Appeals conflicts directly with the standards of the Reardon Report, and that its application is presently actively important in all 50 states. The respondents do not mention the Reardon Report or the opinion of the Court of Appeals.

The sole contention respondents bring here is that the District Court lacked jurisdiction, a matter not decided by the Court of Appeals. For reasons suggested in our petition, this question, too, is important. We have brought the identical substantive problem here from the State Supreme Court in No. 1335 and respondent there contends exclusively that there is no jurisdiction in this Court to review the State Supreme Court order. We have as yet received no response to our petition for mandamus directed to the state trial judge, No. 1726 Misc.; presumably there will also be a jurisdictional objection to it.

But the name of the game is justice, and it does not permit of such foxy play. The practical consequence of the proceedings below is a holding that magistrates conducting preliminary hearings may be deprived of all discretion to close them regardless of the adverse effect on fair trial. This is (a) in conflict with prior decisions of this Court; (b) genuinely important; and (c) ought to be reviewed here.

Respectfully submitted,

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May, 1968